IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

UNITED STATES OF AMERICA	**)**
	)
v.	**)**
	)
ADAM J. GILBURNE,	**)**
Defendant	**)**

RULE 11(f) FACTUAL BASIS FOR GUILTY PLEA

COMES NOW the United States of America through its undersigned counsel, for the purpose of satisfying the requirements of Federal Rule of Criminal Procedure 11(f), submits the following Factual Basis in support of the guilty plea of **ADAM J. GILBURNE:**

1. Defendant **ADAM J. GILBURNE** began employment at Just for Feet ("*JFF*") in 1994. While at *JFF*, defendant **GILBURNE** held various positions including Vice President of Operations/Sales from March 1994 to January 1996; Executive Vice-President from January 1996 to August 1997; and Executive Vice-President and President of the Superstore division of *JFF* from August 1997 until May 1999.

2. *JFF* was founded in 1977 with a single store in Birmingham, Alabama. *JFF* went public in 1994 and expanded rapidly over the next five years, and by 1999, had grown to be the second largest athletic shoe retailer in the United States with locations in thirty states and annual sales of approximately $775 million. In November 1999, *JFF* filed for bankruptcy.

3. Since 1994, when it made its initial public offering (IPO), *JFF* has been an issuer of a class of securities registered under Section 12 of the Securities Exchange Act of 1934 ("the

Act"), required to file reports under said Act. *JFF* filed its quarterly and annual reports with the SEC at its headquarters in Washington, D.C. These reports were transmitted directly and indirectly from *JFF*'s office in Birmingham, Alabama, to the offices of an Atlanta, Georgia filing agent that assists companies in electronically filing periodic reports with the SEC, and were thereafter transmitted electronically to, and filed electronically with, the SEC. *JFF*'s common stock was traded on the National Association of Securities Dealers Automated Quotation System ("NASDAQ") under the symbol "FEET."

4. *JFF*'s fiscal year ran from February 1 to January 31. In January 1999, *JFF* changed the last day of its fiscal year from January 31st to the Saturday closest to January 31st. As a result, the last day of *JFF*'s fiscal year 1998 was January 30, 1999.

5. *JFF* did a large volume of advertising and employed Rogers Advertising, an advertising agency located in Birmingham, Alabama, to place *JFF*'s radio and television advertising. It was common practice in the advertising industry for an advertising agency, such as Rogers Advertising, to receive a 15% discount when placing ads with television stations. The advertising agency would keep for itself the difference between the cost to place the ad and the station's discount. The ads with television stations were often placed weeks or months in advance, but the agency did not earn its agency commission until the ad actually ran. Likewise, Rogers Advertising did not bill *JFF* for television ads unless and until the ads actually ran on television. Because of the seasonal nature of the retail athletic shoe business, most sales, and hence, most television ads occurred during the "Back to School" and Christmas seasons.

6. Beginning in or about 1996, defendant **GILBURNE** attended meetings conducted by the Chief Executive Officer (CEO) towards the end of every quarter where the

CEO would set out the "earnings expectations" or "analyst expectations" of Wall Street investment firms and others of *JFF*'s earnings for that quarter, which were referred to within JFF as "the Street's" expectations, his own targets for earnings for that quarter, which often exceeded those of "the Street," as well as JFF's actual revenue to date. The CEO would then draw up a list of "goods," i.e. those items which produced or added income, and "bads," i.e. items which reduced income. The CEO would then direct *JFF* employees to find ways to increase the "goods" and decrease the "bads" in order to meet his own earnings targets as well as those of "the Street."

7. Defendant GILBURNE, the CEO and others agreed to engage in an illegal scheme, which began in or about December 1996 and continued to in or around November 1999, to inflate artificially *JFF*'s publicly reported earnings and earnings per share and to falsify reports and documents required to be filed with the SEC.

8. In December 1996, the President of Rogers Advertising ("the Rogers' President") met with the CEO who told the Rogers' President that the 15% commission that Rogers Advertising had been earning was too high. The CEO proposed, and the Rogers' President agreed to accept, a monthly retainer instead of the agency commission. The CEO and the Rogers' President agreed that the difference between the 15% agency commission received from the media outlet and Rogers Advertising's retainer earned from *JFF* would be returned to *JFF* as a "rebate." For calendar year 1997, they agreed that the amount would be $730,000.00. This became known as the "Roger's Rebate."

9. The "Roger's Rebate" represented money which was anticipated to be earned by Rogers Advertising and paid to *JFF* in the following fiscal year. However, *JFF* fraudulently

recorded the Roger's Rebate as a receivable due from Rogers Advertising in *JFF*'s current fiscal year and fraudulently treated it as earned income for the current fiscal year.

10. On or about April 22, 1997, the CEO signed *JFF's* 10-K for fiscal year 1996, knowing that because of the Rogers Rebate scheme, *JFF*'s income, as reported in the 10-K, was overstated by $730,000.00.

11. In or about December 1997, the CEO met with defendant **GILBURNE** and described to defendant **GILBURNE** "a great way" to increase *JFF*'s income for that year (1997) by $ 3 million. The CEO explained the Roger's Rebate scheme in detail to defendant **GILBURNE** and cautioned defendant **GILBURNE** that if anyone asked about the Rogers Rebate, defendant **GILBURNE** should falsely say that the rebate was based on business already performed by Rogers Advertising in 1997.

12. In or about December 3, 1997, defendant **GILBURNE** met with Rogers Advertising's President, and others and discussed the need to have Rogers Advertising President prepare and sign a credit memo, addressed to the CEO, which stated that Rogers Advertising was issuing a $3 million credit to *JFF.* The credit memo stated falsely that "[t]his amount constitutes advertising rebates for services rendered prior to January 31, 1998."

13. In or around January 1998, the CEO, defendant **GILBURNE** and others caused this false $3 million credit memorandum from Rogers' Advertising to be entered into *JFF*'s books and records. Based upon this document and others, $3 million was falsely entered into *JFF*'s books and records as a receivable and income to *JFF* as of January 31, 1998.

14. On or about April 24, 1998, the CEO signed *JFF*'s 10-K for JFF's fiscal year 1997, knowing that because of the Rogers Rebate scheme, *JFF*'s income, as reported in the 10-

K, was overstated by $3 million.

13. In or around June 1998, defendant **GILBURNE**, the CEO, Rogers' President and others agreed that Rogers Advertising would be allowed to fraudulently over-bill *JFF* for production costs in order to provide Rogers Advertising with money to repay the balance of the $3 million receivable that Rogers Advertising purportedly owed to *JFF*.

14. On or about December 15, 1998, defendant **GILBURNE,** the CEO, Rogers' President and others agreed that the Rogers Rebate for the upcoming year would be $5.3 million.

15. In or around January 1999, the CEO, and others caused a $5.3 million receivable from Rogers Advertising to be entered into *JFF's* books and records as of January 30, 1999.

16. In or around February 1999, knowing that *JFF* would not spend enough for advertising that year to generate sufficient income from advertising discounts for Rogers Advertising to pay down the $5.3 million receivable, defendant **GILBURNE**, the CEO, Rogers' President and others discussed how *JFF* could provide Rogers Advertising with money to pay down the $5.3 million receivable that Rogers Advertising purportedly owed to *JFF*.

17. In or around February 1999, the CEO, Rogers' President and others agreed that, beginning in the second quarter of 1999, Rogers Advertising would be allowed to over-bill *JFF* $250,000 per month through the remainder of 1999 in order to provide Rogers Advertising with money to pay down the $5.3 million receivable that Rogers Advertising purportedly owed to *JFF*.

18. On or about April 30, 1999, the CEO signed *JFF*'s 10-K for fiscal year 1998, knowing that because of the Rogers Rebate scheme, *JFF*'s income as reported in the 10-K was overstated by $5.3 million.

19. In or around May 1999, defendant **GILBURNE** spoke to Rogers' President about over-billing *JFF* by $250,000 in order to give Rogers Advertising enough money to make a partial repayment of the balance of $5.3 million receivable that Rogers Advertising purportedly owed to *JFF*.

20. In or around June 1999, the President of Rogers Advertising caused Rogers Advertising to submit an invoice to *JFF* which contained approximately $250,000.00 in false and inflated production costs.

21. Defendant **GILBURNE,** the CEO and others made and caused to be made false and fraudulent entries in *JFF*'s books and records knowing and intending (1) that such entries would ultimately be reflected in *JFF*'s financial statements and public filings with the SEC; (2) that *JFF*'s financial statements and public filings would falsely overstate *JFF*'s income, earnings and earnings per share; and (3) that the investing public would rely upon such overstated earnings.

22. This document does not set forth the complete and full extent of defendant **GILBURNE's** knowledge about criminal activity at *JFF*, but is intended only to provide a factual basis for his plea of guilty to an Information filed against him by the government.

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